Supreme Court, U.S.
FILED
DEC 12 2001
CLERK

(3)

No. 01-563

IN THE

Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Petitioners,

v.

BASIC AMERICAN INDUSTRIES INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

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REASONS FOR GRANTING THE WRIT

Respondents assert that Petitioners have not demonstrated a conflict between the decision below and this Court's decision in *Bay Area Laundry & Dry Cleaning Pension Fund v. Ferbar Corp.*, 522 U.S. 192, 118 S.Ct. 542 (1997). Contrary to Respondents' assertion, and as explained in both the Petition and below, the Seventh Circuit's decision in this case clearly conflicts with *Bay Area* by incorporating a common law doctrine that conflicts with the statutory text that this Court authoritatively construed in *Bay Area* to provide for only permissive acceleration. The conflict is made plain by this Court's decision just this Term in *TRW Inc. v. Andrews*, 534 U.S. ___, 122 S. Ct. 441, 447 (2001), wherein the Court held that federal courts are not free to incorporate common law doctrines into statutes where the statute is not silent on the issue that the doctrine addresses. This conflict with the Court's precedents warrants the Court's review. Supreme Court Rule 10(c); *see, e.g, Library of Congress v. Shaw*, 478 U.S. 310, 314, 106 S.Ct. 2957, 2961 (1986) (conflict with Supreme Court precedent warrants grant of certiorari). Further, the issue has importance beyond the context of the statute at issue in this case because numerous statutes and contracts interpreted under federal law create payment schedules and provide a mechanism for the acceleration of payments. *See, e.g., United States v. Feterl*, 849 F.2d 354, 356 (8th Cir. 1988) ("Before the limitations period begins to run, a lender must, at least, have invoked the acceleration clause in the loan agreement").

I. THE DECISION BELOW CONFLICTS WITH *BAY AREA* NOTWITHSTANDING THE DIFFERING FACTUAL CONTEXT BECAUSE THE PERMISSIVE NATURE OF ACCELERATION UNDER THE STATUTE CONTROLS IN ALL FACTUAL CONTEXTS.

The thrust of Respondents' argument is that the decision below does not conflict with *Bay Area* because the Court "did not purport, however, to discuss or define all circumstances or events that might result in 'acceleration.'" (Respondents' Brief in Opposition, p. 7.) Contrary to Respondents' assertion, this Court did define, in interpreting the statute, the situations that constitute a "default" and when that "default" results in "acceleration." The statute defines a "default" as:

> (A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notice notification from the plan sponsor of such failure, and
>
> (B) *any other event* defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

29 U.S.C. § 1399(c)(5) (emphasis added). The broad terms of the "any other event" language in subparagraph (c)(5) make it clear that the statute's definition of "default" encompasses "any" fact situation that the common law would hold creates an anticipatory repudiation.

The consequences of a default are also defined by the statute. The statute provides that "[i]n the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability . . . ." 29 U.S.C. § 1399(c)(5). As the Court stated in *Bay Area*, "[f]or limitations purposes, we cannot assume that a default will or should invariably lead to acceleration, for the

statutory acceleration provision is by its terms permissive." 522 U.S. at 208-09, 118 S.Ct. at 552. Since the permissive acceleration language applies both to a default caused when an employer misses a schedule payment *and* to a default because of "any other event," the factual scenario leading to the default is immaterial to the Court's conclusion in *Bay Area* that the permissive nature of the statute means that acceleration cannot be presumed.

Respondents would have the Court believe that despite the fact that under the statute acceleration is permissive with respect to all defaults, there is a subclass of defaults for which the permissive rule does not apply. However, to read such a rule would change the acceleration provision from permissive to mandatory in derogation of the statutory text. As the Third Circuit stated:

> The position of Kahle and Navco that the whole sum becomes due and the whole claim accrues when the first payment is missed in effect imposes a compulsory acceleration clause. This reads out of the statute the relevant statutory provision with respect to acceleration codified in 29 U.S.C. Sec. 1399(c)(5), which makes acceleration discretionary . . . . One must assume that when Congress provided that in the event of default "a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability," Congress also intended that the plan sponsor could decide not to accelerate the outstanding balance. That option is nugatory if Kahle is correct, because the claim would accrue automatically upon default.

Board of Trustees v. Kahle Engineering Corp., 43 F.3d 852, 859 (3rd Cir. 1994); *see also Miller v. French*, 530 U.S. 327, 337-38, 120 S.Ct. 2246, 2253 (2000) (interpreting statute to make mandatory language permissive would "subvert the plain meaning of the statute"). Not only does the Seventh Circuit's attempt to make the permissive language in the statute mandatory in this case directly conflict with *Bay Area*,

it conflicts with the Third Circuit's interpretation of the same statutory language in *Kahle Engineering*. This conflict exists notwithstanding the different factual scenarios because the permissive nature of the statute applies to *all* factual scenarios by virtue of the statutory language itself.

The Seventh Circuit's reason for incorporating the common law doctrine of anticipatory repudiation can be summed up in the Seventh Circuit's own words:

> Acceleration clauses are inserted to fill a hole in the law of contracts, which has failed here in its traditional and important function of interpolating rights and duties that the parties can be expected to negotiate for, and thus of economizing on the costs of transacting. Acceleration clauses are a standard contract provision for protecting the payee against the consequences of breach by the other party; they would be unnecessary were it not for the rule carving out the completed-performance case from the operation of the doctrine of anticipatory repudiation.

(Appendix A at 7a.) As the quoted language indicates, the Seventh Circuit apparently considered the statutory text as if it were a mere contract between the parties and then went about "interpolating" terms that the "parties" apparently should have included. But the role of a federal court in interpreting a statute "is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126, 110 S.Ct. 456, 460 (1989). Even putting aside the dubious proposition that a statute should be interpreted as a mere contract, Congress itself has "filled the hole" by including an acceleration provision in the statute. Having done so, Congress made acceleration permissive. As this Court has stated "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to

interpret and apply statutory law, not to create common law." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 n.34, 101 S.Ct. 1571, 1583 n.34 (1981).

It is one thing to use common law principles to fill in the "gaps" in a federal statute to deal with situations not contemplated by Congress. It is quite another matter to apply common law principles to a circumstance that was expressly addressed by the statute, and to achieve a result that cannot be reconciled with the text of the statute. In this case, the Seventh Circuit used common law principles to produce an interpretation of the statute which is at odds with the text of the statute, *Bay Area*, and the Third Circuit's decision in *Kahle Engineering*.

A case decided just this Term highlights the conflict between the Seventh Circuit's decision in this case and this Court's jurisprudence. In *TRW Inc. v. Andrews*, 534 U.S. ___, 122 S.Ct. 441 (2001), this Court rejected the application of the discovery rule to a cause of action under the Fair Credit Reporting Act ("FCRA"). The FCRA contains a two-year statute of limitations from the date the "liability arises" but also provides that in the case of a willful misrepresentation, an action may be brought within two years of the discovery of the misrepresentation. In rejecting the application of a general discovery rule, the Court noted that the FRCA "did not cry out for the application of a discovery rule, nor is the statute "silent on the issue" of when the statute of limitations begins to run." *Id.* at ___, 122 S.Ct. at 447. Instead, the Court found that the inclusion of a limited discovery rule in the statute implied the exclusion of a more general rule. *Id.*

In reaching its conclusion, the Court stated that it read Congress' codification of one common law doctrine (tolling the statute when a willful misrepresentation was made) as an intentional rejection of other common law doctrines (a general discovery rule). *Id.* at ___ n.5, 122 S.Ct. at 449 n.5. In *Kahle Engineering*, the Third Circuit analogized default *and*

acceleration to the common law doctrine of anticipatory repudiation. 43 F.3d at 857. To the extent that including default and acceleration under the statute constitutes a codification of the common law principle of anticipatory repudiation, making acceleration permissive under all circumstances is an intentional rejection of any doctrine causing the cause of action to accrue with respect to the entire payment schedule absent an election by the creditor. Yet the Seventh Circuit not only incorporated a common law doctrine to fill a gap under the statute that does not exist, it chose to modify the doctrine as well because the doctrine never applied where the creditor has fully completed performance.

All Respondents can offer by way of rejoinder is to criticize the cases cited by Petitioners as "obsolete," and to assert that the cases "do not come close to establishing a current majority rule." (Respondents' Brief in Opposition, pp. 13-14.) Yet Respondents cite no cases in support of their version of the rule. The fact that Respondents argue that there is no "current majority rule" makes it clear that it cannot be inferred that Congress intended the doctrine of anticipatory repudiation to apply when the contours of the doctrine itself cannot be definitively established.

Finally, Respondents contend that the fact that the statute defines the "employer" as all trades or businesses under common control with the contributing employer, 29 U.S.C. § 1301(b)(1), is immaterial because default for one member of the controlled group is default for all. While this statement is true, it misses the point. Default is defined by the statute and so are the consequences of default (permissive acceleration). Respondents ask the Court not to follow the statute but rather to incorporate the common law doctrine of anticipatory repudiation. However, as the Seventh Circuit noted, under the common law doctrine, a "breach occurs when it is reasonably certain that the other party is not going to meet its obligation under the contract in a timely fashion." Here, treating the statute as a contract, it was not at all

reasonably certain that the other party, namely *all* of the controlled group members, would not pay. Rather, at most all that can be said is that *one* controlled group member could not pay. This situation is a far cry from the reasonable certainty required under the common law doctrine.

II. RESPONDENTS' ASSERTION THAT CENTRAL STATES ACCELERATED THE PAYMENT SCHEDULE IS INCORRECT.

Respondents assert that "Central States thereafter demanded payment in full of the entire amount of the withdrawal liability obligation" (Respondents' Brief in Opposition, p.5) and refer to "Central States' demand of full payment." (Respondents' Brief in Opposition, p.12.) Contrary to Respondents' assertions, Central States never demanded payment of the entire schedule. Respondents point to several events that allegedly constituted acceleration, but none of them stand up under close examination.

The first date that Respondents suggest may have triggered acceleration was May 18, 1990, the date that Central States filed proofs of claim in the bankruptcy. In *Bay Area*, this Court held that "[t]he date of withdrawal cannot start the statute of limitations clock, because the MPPAA affords a plan no basis to obtain relief against an employer on that date." 522 U.S. at 201, 118 S.Ct. at 549. In this case, the withdrawal did not even occur until June 2, 1990, so by definition a cause of action cannot have existed prior to this date.

Despite the fact that a cause of action did not exist, there is a reason for filing a proof of claim prior to the existence of a cause of action. Under the Bankruptcy Code, the definition of a "claim" includes unmatured and contingent claims. 11 U.S.C. § 101(5)(A). As a result, it cannot be inferred from the mere filing of a proof of claim that a cause of action exists

or that a payment schedule has been accelerated. As stated by the Eighth Circuit in *United States v. Feterl*, 849 F.2d 354 (8th Cir. 1988):

> Because acceleration clauses are generally for the benefit of the creditor, courts tread lightly on the creditor's freedom to decide whether acceleration is immediately necessary upon the occurrence of a default. Therefore, acceleration is seldom implied, and courts usually require that an acceleration be exercised in a manner so clear and unequivocal that it leaves no doubt as to the lender's intention and no doubt that the borrower is apprised that the option has been exercised.

Id. at 357 (citation omitted). Notwithstanding the fact that the filing of the proofs of claim cannot constitute acceleration because the filing preceded the date of withdrawal, filing the proofs of claim in this case did not constitute acceleration because there is no indication that Central States was exercising its option to accelerate. Rather, as the Seventh Circuit stated, Central States "demanded payment on the installment plan." (Appendix A at 10a.)

Second, Respondents suggest that the date of withdrawal itself (June 2, 1990), constituted the acceleration. However, as noted above, this Court in *Bay Area* held that the date of withdrawal itself does not create a cause of action under the statute. 522 U.S. at 201, 118 S.Ct. at 549 ("pension plan suit to collect the employer's withdrawal liability, commenced on the date of withdrawal, would be premature"). As a result, the withdrawal date cannot trigger acceleration because the cause of action has yet to exist.

Third, Respondents contend that June 18, 1990, was the date of acceleration because Central States sent a notice and demand on that date. However, the issuance of a notice and demand is merely part of the process that leads to an ultimate cause of action; the mere issuance of the notice and demand is not sufficient. As this Court stated in *Bay Area*, "[o]nce the demand is made, the employer's baseline obligation is to

make each payment as scheduled, unless it chooses to prepay or the plan properly exercises the acceleration option. Until the employer fails to honor its obligation, the plan cannot sue." *Id.* at 202, 118 S.Ct. at 549 (citations omitted). In *Kahle Engineering*, the Third Circuit noted that the notice and demand is required by one part of the statute, 29 U.S.C. §§ 1382, 1399(b)(1), and the discretionary notice of acceleration is required by 29 U.S.C. § 1399(c)(5). 43 F.3d at 861 n.9. This Court's reference in *Bay Area* to the "plan properly exercis[ing] the acceleration option," 522 U.S. at 202, 118 S.Ct. at 549, indicates that the notice of acceleration is distinct from the notice and demand. Otherwise, there would be no way to distinguish the two. *See Kahle Engineering*, 43 F.3d at 861 n.9 ("the acceleration provision would have no significance if the mandatory notice of the amount of withdrawal liability were also to be viewed as a notice of acceleration").[1]

Although the Seventh Circuit acknowledged that Central States "demanded payment on the installment plan," the Seventh Circuit held that this was immaterial to whether

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[1] Respondents suggest briefly that the default automatically triggered acceleration under the terms of Central States' plan and that the Seventh Circuit made a "factual finding" to that effect. (Respondents' Brief in Opposition, pp.12-13.) Contrary to Respondents' assertion, the Seventh Circuit rejected this argument. The Seventh Circuit stated:

> The plan in this case contains an ipso facto clause. For it permits Central States to treat a member's declaration of bankruptcy as a default upon the occurrence of which "the outstanding amount of the withdrawal liability shall immediately become due and payable." The defendants' [Respondents'] argument that the clause was even more-was a Doomsday Bomb *requiring* Central States, whether it wanted to or no, to treat the declaration of bankruptcy as a default, is contrary to the plan's terms, which are permissive rather than mandatory . . . ."

(Appendix A at 9a.) Thus, as the Seventh Circuit correctly recognized, the plan defines when a default has occurred but does not require acceleration in the event of default.

Central States "didn't think Allied had defaulted." (Appendix A at 10a.) As the Seventh Circuit stated, "[t]he statute *required* Central States to formulate an installment plan." (Appendix A at 10a.) What this passage from the Seventh Circuit shows is that it confused the question of whether default occurred with the question of whether acceleration occurred. Viewed in the proper light, the fact that the statute requires a pension fund to formulate an installment plan cuts against the Seventh Circuit's position because under the Seventh Circuit's view the standard notice and demand constitutes a notice of acceleration. However, as demonstrated in the proceeding paragraph, this view is contrary to the statute, *Bay Area*, and *Kahle Engineering*.

CONCLUSION

The decision below conflicts with this Court's decision in *Bay Area* by disregarding the plain language of the statute as authoritatively construed by this Court in favor of incorporating the common law doctrine of anticipatory repudiation which contradicts the terms of the statute. Under the Seventh Circuit's decision, pension funds will lose their ability to forego acceleration because they will be unsure as to their rights under the ill-defined doctrine of anticipatory repudiation. The decision below will also impact numerous other federal statutes requiring multiple payments because parties will not be able to rely on the plain meaning of the statute as it pertains to the statute of limitations but will instead be required to consider common law doctrines that are not mentioned in the statute (or even worse, as here, conflict with the statute). *See TRW Inc. v. Andrews*, 534 U.S. ___, 122 S.Ct. 441, 453 (Scalia, J., concurring) (stating that application of unspecified common law principles "casts the meaning of innumerable other limitation periods in doubt"). For these reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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